Supreme Court, U.S.
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No._____

IN THE
SUPREME COURT OF THE UNITED STATES

JEFFREY BALAWAJDER,
Petitioner

VS.

JANIE COCKRELL,
Respondent

On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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59 pp

QUESTIONS PRESENTED

QUESTION NO. 1

In a case alleging actual innocence by an exculpatory blood test, what is the proper standard for equitable tolling the 1-year limitations period of the Anti-terrorism and Effective Death Penalty Act (AEDPA) when there is a conflict of the circuit standards for a petitioner not meeting the limitations period due to the fact that the prison law library did not contain the AEDPA until after that limitations period completely expired?

QUESTION NO. 2

Does the refusal of prison officials to provide the Anti-terrorism and Effective Death Penalty Act (AEDPA) to prisoners until a year after the effective date of the AEDPA qualify as the kind of state created impediment that, under 28 U.S.C. §2244(d)(1)(B), causes the 1-year limitations period to begin from when that impediment is removed?

QUESTION NO. 3

Does the limitation period of the Antiterrorism and Effective Death Penalty Act (AEDPA) suspend the Great Writ when, in a first federal habeas petition, actual innocence is alleged on the basis of an exculpatory blood test, and the limitations period was not met because the prison law library did not contain the AEDPA until after that limitations period completely expired?

QUESTIONS PRESENTED

QUESTION NO. 4

Does the Fifth Circuit standard of equitable tolling, which conflicts with the Ninth Circuit standard for the same facts, suspend the Great Writ when, in a first federal habeas petition, actual innocence is alleged on the basis of an exculpatory blood test?

STATEMENT OF INTERESTED PARTIES

Petitioner

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PETITION FOR A WRIT OF CERTIORARI

Petitioner prays that a Writ of Certiorari issue to review the judgment of the U.S. Court of Appeals for the Fifth Circuit filed April 5, 2001.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit was not reported except in table at 252 F.3d 1357 and is attached as Appendix A.

STATEMENT OF JUBISDICTION

The opinion of the U.S. Court of Appeals for the Fifth Circuit was filed on April 5, 2001. A Petition for Rehearing and Rehearing En Banc were denied on August 16, 2001. Appendix B. This instant petition followed within 90 days. 28 U.S.C. §2101(c). The jurisdiction of this Honorable Court is invoked under 28 U.S.C. §1254(1).28 U.S.C. §2403 (a) may apply but no court has given notice to the Attorney General that 28 U.S.C. §2403(a) may apply.

VERBATIM AUTHORITIES

Appendix C sets forth, verbatim, the following constitutional provisions and statute involved in this case--- U.S. Constitution, Article I, Section 9; U.S. Constitution, Amendments I and XIV; and 28 U.S.C. §2244(d) [effective 4-26-96].

STATEMENT OF FACTS AND CASE

After a mistrial on March 11, 1988 (R105), on August 10, 1988, in Criminal District Court Number Four

of Tarrant County, Texas the Petitioner was convicted for the May 31, 1983 rape of Leah Matzinger, and sentenced to prison for 70 years aggravated (20 years minimum) (R106). On November 5, 1991, the Petitioner's direct appeal was denied. On April 15, 1991, the Petitioner's petition for discretionary review was denied by the Texas Court of Criminal Appeals.

On January 26, 1997 and February 25, 1997, the Petitioner filed, respectively, an official prison grievance and appeal complaining that the Anti-terrorism and Effective Death Penalty Act (AEDPA), effective 4-26-96, was not available to him, but on February 18, 1997 and March 10, 1997, respectively, the grievance and appeal were denied (R 284-285; 278-279). On January 7, 1998, the Petitioner filed his State habeas petition (R280). On March 28, 1998 the AEDPA was made available to the Petitioner for the first time when the AEDPA was put into the prison law library (R 279). On September 16, 1998 the State habeas petition was denied without a written order "on findings of the trial court without a hearing."

On December 17, 1998, the Petitioner filed his first post-conviction federal habeas petition (R1-273). That petition states facts showing, inter alia, that: (1) the Petitioner is actually innocent (R126-141) and; (2) that the Respondent caused, or contributed to, the delay in filing the State habeas petition, and thereby contributed to the delay in filing the federal habeas petition, by refusing to loan the Petitioner the existing records of his case (R62-63, 109-113, & 205-220). With the federal habeas petition, the Petitioner filed an "Affidavit of Jeffrey Balawajder Regarding State Created Unconstitutional Impediments to

Filing Federal Habeas Petition" (R277-287) (AFFIDAVIT). The AFFIDAVIT states many facts regarding the Petitioner not filing his federal petition within one year of the April 24, 1996, the effective date of the AEDPA (R277-287). The AFFIDAVIT included a copy of the above described grievance documents (R284-285). The AFFIDAVIT also included a copy of an official "Inmate Request to Official" that was sent to the Ellis Unit prison law library supervisor, Lt. Taylor, asking the exact date the AEDPA was made available to general population inmates, and showing that Lt. Taylor answered that the AEDPA came in January 1998 (R286-287). The Petitioner was a general population inmate at the Ellis Unit from April 28, 1995 to September 30, 1998 (R277). The Petitioner's federal habeas petition was filed within one year of March 28, 1998, the date he first had access to the AEDPA. The State habeas was pending 252 days.

On April 14, 1999, the "Findings, Conclusions and Recommendations of the United States Magistrate (MAGISTRATE'S REPORT) was filed (R288-299). On May 3, 1999, the Petitioner filed the "Petitioner's Objections to the Findings, Conclusions and Recommendations of the United States Magistrate" (OBJECTIONS) (R301-324). The OBJECTIONS: (1) answer questions that were raised in the MAGISTRATE'S REPORT; and (2) contain additional facts to support the answers to the MAGISTRATE'S REPORT. On May 20, 1999, the District Court issued an Order (R326-327) adopting the MAGISTRATE'S REPORT, and issued the Final Judgment dismissing this case with prejudice (R329). On June 3, 1999, the Petitioner filed a motion for

relief(R332-334), and on June 22, 1999, the District Court denied that motion for relief (R337).

On July 9, 1999, the Petitioner filed a "Notice of Appeal" (R338-339) and "Application for Certificate of Appealability" (R340-348). On July 19, 1999, the District Court denied a certificate of appealability (COA) (R349350). On July 28, 1999 the Petitioner filed a motion for relief in regard to the COA, but on August 7, 1999, the District Court denied that motion for relief. On August 25, 1999, the Petitioner filed an "Amended Notice of Appeal" (USDC Document #16). On October 1, 1999, the Petitioner filed an application for COA in the U.S. Court of Appeals for the Fifth Circuit. On January 21, 2000, the Fifth Circuit granted a COA for two issues: (1) whether "[g]iven Balawajder's allegations of a lengthy delay and given that a significant delay ("months and months") in receiving information about the AEDPA may warrant equitable tolling; and (2) "whether the court has jurisdiction to reach the Fisher [v. Johnson, 174 F3d 710 (5CA 1999)] issue in Balawajder's case."

In March, 2000 the Petitioner received a copy of Felder v. Johnson, 204 F3d 168 (5CA 2000) as 2000 WL 144178 from a prisoner at the Ellis Unit, Billy Ray Risley, and he received it as part of a supplemental letter brief filed in Risley's Fifth Circuit case, Case No. 98-11175. In response to the Felder decision, on or about April 3, 2000, the Petitioner filed a motion to add an issue to the COA. On June 28, 2000, the following third issue was added to the COA: "Whether the prison's library's delay in receiving a

copy of the Antiterrorism and Effective Death Penalty Act (AEDPA) constituted a state-created impediment under 28 U.S.C. §2244(d)(1) (B), that postponed commencement of the limitations period for filing his federal habeas petition." On April 5, 2001, the Fifth Circuit entered judgement affirming the dismissal. A Petition for Rehearing and Rehearing En Banc was denied on August 16, 2001 despite a conflict of decisions of the circuits.

REASONS FOR GRANTING THE WRIT

A panel decision of U. S. Court of Appeals for the Fifth Circuit has decided an important issue of law contrary to the decision reached by the U.S. Court of Appeals for the Ninth Circuit sitting en banc. Also, that panel decision of the U.S. Court of Appeals for the Fifth Circuit conflicts with its own prior panel decisions. Furthermore, the decision of the Fifth Court suspends the Great Writ at least as the 1789 common law writ of habeas corpus existed to resolve the pure questions of law in this instant case.

ARGUMENT

One of the greatest glories of democracy, the Great Writ, is in danger of being destroyed by procedural rules. Historians glorify those times and people who created and maintained the Great Writ.

Actual Innocence

The most basic principle underlying the Great Writ is that an imprisoned person may challenge his confinement by the Great Writ when his confinement is contrary to the basic principles of fairness and justice. There is no confinement that is more against the basic principles of fairness and justice than the imprisonment of an actually innocent person. Thus, the most basic function of the Great Writ is to release an actually innocent person from imprisonment. "Dismissal of a first federal habeas petition is a particularly serious matter, for that dismissal denies the petitioner the protection of the Great Writ entirely, risking injury to an important interest in human liberty." Lonchar v. Thomas, 517 U.S. 314, 324 (1996) quoted in Miller v. Marr, 141 F3d 976, 978 (10 CA 1998)(discussing actual innocence and equitable tolling AEDPA l-year limitations); Cooper v. Oklahoma, 517 U.S. 348, 352-56 (1996).

The factor underlying each of the questions in this case is actual innocence. The Petitioner has made a credible showing of actual innocence. Appendix D.

> "[T]he Eighth Circuit Court of Appeals has repeatedly recognised that "actual innocence"" can, at least theoretically, overcome other procedural defaults, allowing review in habeas actions. [Citations omitted]. The reasonable conclusion from these decisions is that "actual innocence can overcome procedural default of timeliness requirements even as timeliness is now codified under the AEDPA in 28 U.S.C. §2244(d)(l).

"As the Second Circuit Court of Appeals explained in Lucidore v. New York State Div. of Parole, 209 F3d 107 (2d Cir 2000) petition for cert filed (July 5, 2000)(No. 00-40), several Circuit Court of Appeals have specifically suggested that the "actual innocence" gateway must remain open not withstanding the AEDPA's express time limitations, to avoid raising serious constitutional questions.

n.7 "[I]n Schlup v. Delo, 513 U.S. 298, 115 S.Ct. 851, 130 L.Ed2d 808 (1995), the Supreme Court distinguished between a "gateway" claim of actual innocence and a "substantive" claim of actual innocence as follows: "Schlup's claim of innocence, on the other hand is procedural, rather than substantive ... In Herrera, petitioner's claim was evaluated on the assumption that the trial that resulted in his conviction was error free ... Schlup, in contrast, accompanies his claim of innocence with an assertion of constitutional error at trial. For that reason, Schlup's conviction may not be entitled to the same degree of respect as one, such as Herrera, that is the product of an error free trial.. Consequently, Schlup's evidence of innocence need carry less of a burden.""

Neuendorf v. Graves, 110 F.Supp.2d 1144
1155-1156 & n.7 at 1157-1158 (N.D. Iowa)
[See also the very scholarly three page discussion of the cases in Neuendorf v. Graves, 110 F.Supp2d at 1156-1158, regarding actual innocence overcoming the 1-year AEDPA limitation].

This instant Petitioner has argued that there were constitutional errors committed in this case that undermine the reliability of the results of the trial. (R 15-29). Therefore, the showing he has made regarding actual innocence (R126-141/Appendix D) is sufficient to carry the burden of proof in this case. Schlup v. Delo, 513 U.S. 298 (1995).

The Fifth Circuit opinion (Appendix A) is completely silent on the issue of actual innocence even though the Petitioner extensively argued it in the brief, petition for rehearing, and suggestion for rehearing en banc.

The Petitioner requests this Honorable Court to consider the actual impact on society that will result from the failure to consider actual innocence and the claims presented. Citizens of the United States worked to protect this nation because it claims its citizens are assured of fairness and justice from its courts. The Petitioner's father, now deceased, fought in WWII for the U.S.A., obtained an aeronautical engineering degree with the G.I. Bill, and eventually became the Chief Director of U.S. Air Force Procurement and Planning. At the funeral of the Petitioner's father, there was a full military honor guard and gun salute as US. Air Force jets nearly converged over his burial. The Petitioner's father would consider that his work for the U.S.A. was wasted if this Supreme Court will not even consider the facts and issues his son presented to show he is actually innocent. So, think deeply about how your decision will affect the U.S.A. in the future.

Equitable Tolling

The panel decision (Appendix A) holds that a split decision case of the U.S. Court of Appeals for the Fifth Circuit is controlling in this case, Felder v. Johnson, 204 F3d 168 (5CA 2000). However, the Fifth Circuit's split panel decision in Felder conflicts with the Ninth Circuit's En Banc decision in Whalem/Hunt v. Early, 233 F3d 1146 (9CA 2000) (Reh'g En Banc). In Whalem/Hunt the Ninth Circuit, sitting en banc, held that the district court did not properly consider the question of equitable tolling the l-year time limitations imposed by 28 U.S.C. §2244(d) because the district court did not consider the failure of the prison authorities to provide the Anti-terrorism and Effective Death Penalty Act (AEDPA) until after the l-year limitations expired. Directly opposed to that en banc decision of the Ninth Circuit is the split panel decision of the Fifth Circuit in Felder, wherein the 2-judge panel majority held that the failure of the Texas prison officials to provide the AEDPA should not ever be used as a factor in deciding whether to equitably toll the l-year limitations period imposed by 28 U.S.C. §2244(d). Felder, 204 F3d at 171-172.

Also the Fifth Circuit's split panel decision in Felder conflicts with its own prior jurisprudence that holds: (1) that a question of equitable tolling is to be based on the facts of the particular case, Davis v. Johnson, 158 F3d 806 (5CA 1998); and (2) that "equitable tolling focuses on the plaintiff's excusable ignorance of the [law]." Amburgey v. Corhart Refactories Corp., Inc., 936 F2d 805, 810 n.14 (5CA 1991).

The Felder 2-judge majority held that particular categories of facts, such as the refusal of the prison officials to provide the AEDPA or prisoners' excusable ignorance of the law, can never be the basis for equitable tolling the AEDPA l-year limitations. That holding of Felder conflicts with the holding in Davis, and cases cited in Davis, that equitable tolling is to be decided on a case by case basis according the facts of each case. Although Felder also cites Davis on a different point of law, Davis cites Conaway v. Control Data Corp, 955 F2d 358 (5CA 1992), and Conaway quotes a case that is contrary to Felder. In Conaway, the Court explained the difference between equitable estoppel and equitable tolling as follows-

> "Recently, in Rhodes v. Guibersoin Oil Tools Div., 927 F2d 876 (5th Cir 1991), we quoted with approval a technical distinction drawn in a Fourth Circuit opinion between equitable estoppel and the more general concept of equitable tolling. A defendant is equitably estopped from asserting that a claim is time barred where his conduct induced a plaintiff to refrain from exercising its rights. "EQUITABLE TOLLING FOCUSES ON THE PLAINTIFF'S EXCUSABLE IGNORANCE OF THE [LAW][informally called the] employer's discriminatory act. Id., (quoting Felty v. Grace Humphreys Co., 785 F2d 518, 519 (4th Cir. 1986)(also quoted in Clark v. Resistoflex Co., 854 F2d 762, 769 n.4 (5th Cir 1988)))."

Amburgey v. Corhart Refactories Corp.,
936 F2d 805, 810 n.14 (5CA 1991)

The above quote shows several cases from the Fifth Circuit have held that the basis of equitable tolling is the "plaintiff's excusable ignorance of the [law]!" However, the basis of the Felder decision is that "ignorance of the law is no excuse". Felder, 204 F3d at 176.

Denial of Access to Courts

The basis of the Felder decision also directly conflicts with jurisprudence of this Honorable Court holding that the Respondent has an affirmative constitutional duty to provide prisoners with access to the courts that is "adequate, effective and meaningful". Bounds v. Smith, 430 U.S. 817, 822 (1977). Thus, prisoners' ignorance of the law is an excuse when the Respondent prison official does not perform, or refuses to perform, his affirmative constitutional duty to provide access to the courts so that prisoners are not ignorant of the law. As Justice E.M. Garza quoted in his Felder dissent: "To show a violation of a constitutional right of access to courts, a prisoner might show, for example, that a complaint he prepared was dismissed for failure to satisfy some technical requirement which, because of deficiencies in the prison's legal assistance facilities he could not have known."" Felder, 204 F3d at 177 (E.M. Garza, J., dissenting) quoting Lewis v. Casey, 518 U.S. 343, 351, 116 S.Ct. 2174 (1996). This Court has previously stated that to show actual injury in a denial of access case, the prisoner need only show that the pursuit of a legal claim was "hindered", Lewis, 116 S.Ct. at 2180, or "had been frustrated or was being impeded" in presenting his legal claims. Lewis, 116 S.Ct. at 2181.

The record in this instant case shows that the Petitioner was hindered, frustrated and impeded in presenting his legal claims in a timely manner because the prison law library did not contain the AEDPA until the l-year limitation period had completely expired. (R 277-287, 309-319 & 322-323). Furthermore, prison officials have the burden of proof to demonstrate that they provide prisoners with constitutionally adequate access to courts. Ruiz v. Estelle, 679 F2d 1115, 1154 (5CA 1982).

Without comment the Felder, 2-judge majority destroys this Court's jurisprudence that holds that this instant Petitioner has rights to petition for the redress of grievances and to petition for writ of habeas corpus. This Honorable Court may use this instant case to reconsider whether prison officials have a constitutional duty to provide access to the courts. Honorable Chief Justice Rehnquist dissented in Bounds because he could not find any textual basis in the Constitution for requiring prison officials to provide access to the courts. This instant Petitioner agrees with that dissenting view of the Chief Justice. Each branch of government has the duty to provide access to itself. The President of the executive branch decides who and when access to the President shall occur. Congress decides who and when access to members and committees of Congress shall occur. However, under present Supreme Court jurisprudence the Judiciary does not have the duty to provide access to itself. Bounds shifted the burden of providing access to the courts from the judicial branch to the executive branch. The duty of providing

access to the courts rightly belongs with the judicial branch, not the executive branch. Courts must give access to the courts. This Honorable Court can use this instant case to correct the fault of having the executive branch have the fundamental duty of providing access to the courts.

Deception Should Not Be Rewarded

In this instant case, an important fact is that the Respondent deliberately, not just negligently, refused to provide the Petitioner with the AEDPA. (R284-285). In support of their ritualistic chant that "ignorance of the law is no excuse", Felder cites Barrow v. New Orleans S.S. Assn., 932 Fr2d 473, 478 (5CA 1991). However, Barrow is distinguished by the fact that Barrow was not a prisoner and the defendants in Barrow did not have an affirmative constitutional duty to provide the opposing party with access to the courts. Nevertheless, Barrow's third factor for granting equitable tolling weighs in favor of granting equitable tolling in this instant case--- when the defendant has mislead the plaintiff about the nature of his rights. Barrow, 932 F2d at 478. See also, County Welcome Center v. Brown, 466 U.S. 147, 151 (1984). The Respondent in this instant case should not be allowed to profit from misleading the Petitioner by not fulfilling his affirmative constitutional duty to provide the Petitioner the AEDPA.

Rare and Exceptional

A panel of the Fifth Circuit in Davis v. Johnson, 158 F3d 806 (5CA 1998) added a novel requirement that equitable tolling only be granted in "rare and exceptional" circumstances. Davis, 158 F3d at 811. The Felder 2-judge

majority held that because the Respondent's failure or refusal to provide the AEDPA affected a group of prisoners, then equitable tolling could not be granted because the circumstances were not "rare and exceptional". Felder, 204 F3d at 171. However, as Judge E.M. Garza pointed out in his dissent, because the Court cannot permit routine or widespread violations of the Constitution, the "rare and exceptional" standard should be satisfied whenever it is show that a violation of the U.S. Constitution has occurred. Felder, 204 F3d at 177 and n.4 at 174 (Garza, J., dissenting). A common sense understanding of the problem with the reasoning of the 2-judge Felder majority in using the "rare and exceptional" standard is that it is like giving a life sentence to a thief that steals $10 but giving a one year sentence to a thief that steals millions of dollars. The fact the 2-judge Felder majority has pointed out that this issue affects the administration of justice in several or many, many cases is a significant reason for this Honorable Court to grant certiorari.

Diligence

Diligence is also a factor in considering whether to grant equitable tolling. However, diligence is relative. A lawyer's diligence and a prisoner's diligence are not the same. Easterwood v. Champion, 213 F3d 1321, 1323 (10CA 2000) [Followed in Wims v. U.S., 225 F3d 186, 190 (2CA 2000) and explained in Neuendorf v. Graves, 110 F.Supp2d 1144, 1154 (N.D. Iowa 2000)].

In the District Court the Petitioner presented facts and arguments showing his due diligence. (R 313-318). However, the Fifth Circuit Opinion (Appendix A) questioned why the Petitioner did not attempt to obtain the AEDPA from the State Law Library. In the Petition for Rehearing and Suggestion for Rehearing En Banc, the Petitioner pointed out that--- The State Law Library would not have loaned the AEDPA to the Petitioner if he had requested it because in 1995, or earlier, the State Law Library sent out a notice to all prison unit law libraries that loan services to prisoners were discontinued except for personal case records in the Austin Court of Appeals and Texas Court of Criminal Appeals, and that it would no longer accept postage stamps for making copies of those court records. The Petitioner also did not contact the State Law Library because he did not receive the courtesy of a reply to two previous requests he made to it concerning other legal matters; and after he sent some postage stamps to it for a copy of some of the Texas Administrative Code, then it never sent the code to him, but kept (stole) the stamps. The Respondent's "pass the buck" remark about the State Law Library does not relieve him from his affirmative Constitutional duty to provide the Petitioner with access to the courts, including timely providing the AEDPA to him. If such a flimsy remark is a sufficient excuse, then any prison official can circumvent his constitutional duty by simply remarking that the prisoner can get his legal reference material somewhere else.

Furthermore, in a similar situation, the Ninth Circuit has held-

> "In a denied motion for reconsideration and now on appeal, Mr. Easterwood challenges this determination and points out that §2244(d)(1)(D) requires the one year limitation to run from the date on which the information was discoverable by "due diligence". Easterwood argues that, for a prisoner, a case is discoverable by "due diligence" on the date the opinion became accessible in the prison law library, not the date the opinion was issued. We agree. Unlike the general population, which has greater access to court opinions, prisoners must rely exclusively upon the prison law library to discover information contained in new cases. Holding that a prisoner could with "due diligence" discover information related in a case before the prison law library has access to a copy of the opinion simply ignores the reality of the prison system."

Easterwood v. Champion,
213 F3d 1321, 1323, 1323 (10CA 2000) [Followed in Wims v. U.S.,
225 F3d 190 (2CA 2000); and Explained in
Neuendorf v. Graves, 110 F.Supp2d 1144, 1154 (N.D. Iowa 2000)].

Punishment for Not Abusing Writ

Another factor for equitable tolling is that unless equitable tolling is granted, then the Petitioner will be punished for not abusing the Great Writ. If the Petitioner had abused the Great Writ by filing annual piece-meal state and federal habeas petitions, presenting each year since June 1992 a few grounds of the one federal habeas petition he filed in this case, then he would be in a better position than he is now since he took the time to file all the grounds in this one post conviction habeas petition.

Statutory Tolling

- As far as the Appellant knows, the question of what circumstances qualify a petition for statutory tolling under 28 U.S.C. §2244(d)(1)(B) [See Appendix C-23] is an issue of first impression in this Honorable Court.

28 U.S.C. §2244(d)(1)(B) states--

> "A 1-year period of limitations shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of--- (B) the date on which the impediment to filing an application created by state action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action."

Although there is no published case law on the application of 28 U.S.C. §2244(d)(1)(B), the case law is well established as to what is an unconstitutional impediment to the courts. The law and arguments stated herein above pages 11 and 12, in regard to what is an unconstitutional impediment to the courts, is incorporated herein.

The Petitioner is entitled to statutory tolling under 28 U.S.C. §2244(d)(1)(B) because he was prevented from timely filing his federal habeas petition because of a State created unconstitutional impediment, to wit: the State Respondent's refusal to timely provide the AEDPA to the Petitioner, so that he would know EXACTLY how much time the AEDPA allowed him to file his federal petition, how to calculate the l-year limitations period, and show he is entitled to relief under the AEDPA standards.

The issue was presented to the District Court (R 302-303, 304, & 321323) and the issue was heard in the U.S. Court of Appeals. The Court of Appeals held in its Opinion/Judgment (Appendix A-2 and A-3) that the Petitioner was not entitled to tolling under 28 U.S.C. §2244(d)(1)(B) because: (1) the Record reflects that the Petitioner had actual awareness of the existence of the AEDPA well before the one-year period expired; (2) the Petitioner affirmatively requested a copy of the AEDPA on the grounds that he knew that it contained an important limitations; and (3) the Warden advised the Petitioner to request the AEDPA from the state law library in Austin but there is no evidence to suggest that the Petitioner did so. (Appendix Pages A-2 and A-3). In his Petition for Rehearing the Petitioner countered or refuted each of those three reasons the Court of Appeals gave for not granting him statutory tolling under 28 U.S.C. §2244(d)(1)(B).

Court of Appeals "Reasons" #1 & #2

The facts in the Record (R 313-314), also presented in the Petitioner's Court of Appeals Brief and Petition for Rehearing, show the following--- Prior to March 28, 1998, the Petitioner knew of the existence of the AEDPA but did not know the specific contents, time limits, and standards contained in the AEDPA. The Petitioner filed the grievance and grievance appeal to try to obtain a copy of the AEDPA so that he could prepare and file his state and federal habeas petitions to meet the specific or exact time limits and standards. The Petitioner saying that a statute or law exists does not mean that he knew the contents of the statute or law. The little knowledge the Petitioner had about the AEDPA at the time he filed the grievance came from newspapers, television, friends' correspondence, and conversations with friends. When the Petitioner filed the grievance he knew the AEDPA contained a time limit for filing a habeas petition, but he did not know the length of the time limit, he did not know how to calculate the beginning and end of the time limit, did not know if the time limit applied to both state and federal habeas petitions, and did not know if the time limit would apply retroactively to old cases like his. When the Petitioner filed the grievance, he knew the AEDPA contained new standards of review, but he did not know those new standards, he did not know if they applied to both state and federal habeas petitioners, and did not know if they would apply retroactively to old cases like his. The Petitioner thought that it would be best if he could read the AEDPA before he filed his state habeas petition.

On January 26, 1997, the Petitioner filed the grievance and on March 10, 1997 he filed the appeal of the denial of the grievance. As soon as possible after the Petitioner received the denial of the grievance appeal around March 15, 1997, he prepared and filed his long complicated state habeas petition with many exhibits (R 94- 273) as best and as fast as he could without knowing whether he complied or not with the AEDPA. The Petitioner took the time necessary to properly research and present the arguments in support of granting the writ of habeas corpus to relieve him of the 70 year aggravated sentence (minimum of 20 years without parole). Considering the length of the sentence, the Petitioner researched, drafted, copied, and filed as best and as fast as he could. The Petitioner should not have taken less time and filed an incomplete state petition that had no chance of success just so that it could be more quickly filed. The Petitioner's state habeas petition was filed on January 7, 1998, which is 10 months from the denial of the grievance appeal. This was a situation where the Petitioner was "damned if I do and damned if I don't". (R 313-314)

The Court of Appeals' first and second reasons for denying statutory tolling absurdly suggests that the Petitioner would be in a better position if he had remained completely ignorant of the very existence of the AEDPA instead of: learning there was an AEDPA; diligently trying to learn more about it so that he could comply with it; and not learning the details in time to comply with it! The Court of Appeals Opinion punishes the

Petitioner for trying, but failing, to diligently find out the details of the AEDPA limitations and standards.

Court of Appeals "Reasons" #3

The third reason the Court of Appeals gave for denying statutory tolling is that the Warden advised the Petitioner to request the AEDPA from the state law library in Austin and there is no evidence to suggest that the Petitioner did so. (Appendix Page A-3). In above pages 15 and 16 the Petitioner has completely refuted that "Reason #3".

Another Point About Statutory Tolling

Although the Petitioner has requested this Honorable Court to overrule Felder in regard to it holding that equitable tolling cannot be based on the failure of prison officials to timely provide the AEDPA, Felder supports the Petitioner on this issue of statutory tolling. Felder at least theoretically follows Fields v. Johnson, 159 F3d 914 (5CA 1998) and Lonchar, v. Thomas, 517 U.S. 314 (1996). In Fields the Fifth Circuit held that-

> "[E]quitable tolling may modify the strict one-year limit, so too must the tolling mandated by the AEDPA." Fields 159 F3d at 915.

Thus in Fields the Fifth Circuit held that statutory tolling should be given priority over equitable tolling. That holding was indicated in Lonchar when this Honorable Court admonished the courts not to create equitable reasons for dismissal of a federal habeas petition when there are statutory rules governing the dismissal of those petitions. The logical inference or extension of Lonchar is that the courts should not create equitable reasons to toll a federal habeas petition when there is a statutory reason to toll the federal habeas petition on the same facts.

Suspension of the Writ

There is a split among the Honorable Justices of this Supreme Court as to the meaning and scope of the No Suspension of the Writ Clause. Immigration and Naturalization Service v. St. Cyr, 533 U.S.____, 121 S.Ct. 2271, 2279-2282 (2001) (Majority Op. By Justice Stevens joined by Justices Kennedy, Souter, Ginsberg, and Breyer); and 121 S.Ct. at 2299-2303 (dissenting Op. By Justice Scalia joined by Chief Justice Rehquist and Justices Thomas and O'Connor). The Petitioner contends that the AEDPA has, in this instant case, suspended the writ of habeas corpus in violation of the U.S. Constitution. I.N.S. v. St. Cyr, 553 U.S. ____, 121 S. Ct. 2271,2279-2282 (2001); Wilkes, State Postconviction Remedies and Relief, 2-1 "The writ of habeas corpus in North America, 1607-1709" (2001 Edition, Harrison Co. Publishers); Wilkes, Federal and State Postconviction Remedies and Relief, 2-3 and n.3 (2d Edition 1990 Harrison Co. Publishers). University of Georgia Law Professor Wilke's 2001 edition of State Postconviction Remedies and Relief is full of his erudite scholarship, with many notes referring to old and new supporting authorities on the subject of the scope and meaning of the No Suspension of the Writ Clause, that supports the Petitioner and shows that this Honorable Court has not previously given adequate consideration to this important question. Professor Wilke demolishes the contention of the St. Cyr. Dissenters the No Suspension of the Writ Clause had no effect until Congress made a habeas statute that could be suspended. Wilkes, State Postconviction and Relief, 2-1. Professor Wilke states that—

> "Exactly when to what extent did English statutory and common law become part of the law of the 13 American colonies during the period stretching from 1607 (when Virginia, the first permanent English

colony in North America, was settled) until 1776 (when the American Revolution began)? This, the question of the reception of English law into the 13 colonies, is perhaps the most controversial as well as important question relating to American Colonial legal history. 1/There have been two principal views concerning this question. One view, which appears to have less support nowadays than formerly, is that "for a long time after their settlement "2/ the law of the colonies consisted of a rude, popular, nontechnical, equitable, layman's law which only later was replaced by English statutory and common law.3/ The traditional view and the view defended in the most reliable recent scholarship is that, subject to certain limitations and exceptions, English law "was substantially in force in the colonies from the time of their settlement." 4/ "Obviously, the issue of when the English writ of habeas corpus was received into the English colonies in North America is closely related to the more fundamental question of the reception of English law into the colonies generally. 5/ In order to understand when and where the writ of habeas corpus was transported to and became part of the law of the 13 colonies, however, it is not necessary to resolve the competing views with respect to the introduction of English law generally into the colonies, for reception of habeas corpus into the 13 colonies can be satisfactorily understood by inquiring into two matters: First, when did habeas corpus, de jure (by lawful right), become part of the law of the colonies?" Second, when did habeas corpus, de facto (in factual practice), become part of the law of the colonies?"

"In the 17th and 18th centuries it was an established proposition that Englishmen carried their basic rights

with them as their birthright when they settled in an uninhabited land and founded a colony by occupation. 6/ Furthermore, a majority of the 13 English colonies in North America were settled under a charter securing the colonists the rights of Englishmen, 7/ and the rest of the colonies were governed by local laws securing such rights to the colonists. 8/ Since by the 17th century the writ of habeas corpus, like trial by jury and the right to due process of law, unquestionably was regarded by the American colonists as one of the most important of common law rights of Englishmen, 9/ there can be little doubt that, de jure, the English common law writ of habeas corpus became part of the law of each 13 colonies at the time it was settled or shortly thereafter. 10/ "There are a number reasons why it took so long after 1607 for the common law writ of habeas corpus to be actually administered to any significant degree by the courts of the 13 colonies. First, existence of habeas corpus presupposes a separation of the powers between the judiciary on one hand and the execute and legislature on the other hand, and yet for much of the 17th century there was no separation of powers in the governments of many of the colonies. 17/ Second, the ready availability of fines, corporal punishments, and banishment as punishment, combined with the primitive state of frontier life in small villages where the colonists were surrounded by vast forests and hostile Indians, made, especially in the early days, imprisonment of able- bodied persons, including suspected or even convicted criminals, wasteful, expensive, and unnecessary; and therefore actual use of the imprisonment in the colonies was infrequent for much of the colonial era. 18/ "(notes omitted)

Wilkes, State Postconviction Remedies and Relief, 2-1 (2001 Ed.)

Professor Wilkes goes on to show that, since the common law writ of habeas corpus was very well established in the law of the 13 colonies prior to the drafting of the U.S. Constitution in 1787, the No Suspension of Writ Clause protects the well established common law right of habeas corpus. Wilkes, State Postconviction Remedies and Relief, 2-1 (2001 Edition).The majority opinion in St. Cyr cited one case supporting its view that the common law writ of habeas corpus, as it existed in 1789, when the U.S. Constitution was drafted, was not limited to only questions of jurisdiction and it could be issued upon questions of law essential to the continued imprisonment of a convicted prisoner. I.N.S. v. St. Cyr, 121 S.Ct. 2280-2281 and n.23. Professor Wilkes provides additional supporting authorities---

> "in only one reported case was habeas corpus granted to a person imprisoned pursuant to a common law court conviction. N.3. Rex v. Collyer, 95 Eng. Rep. 647, 96 Eng. Rep. 797 (K.B 1752) (Habeas as relief granted to petitioner who had been convicted of assault in the Court of Quarter Sessions). See also Dodd's Case, 44 Eng. Rep. 1087 (CH. 1858)(Habeas relief granted to a petitioner imprisoned for contempt by the Royal Court of Jersey); Bushells' Case, 124 Eng. Rep. 1006 (C.P. 1670) (Habeas relief granted to a petitioner imprisoned for contempt by the Court of Oyer and Terminer)."

Wilkes, Federal and State Postconviction Remedies and Relief at 2-3 & n.3 (1990 Ed.) (Note that the common law courts of old England tried treason, felonies, and

misdemeanors.) Since the Petitioner with little access to judicial reference materials, has found a reference relevant to the controversy of the scope of the Suspension Clause, then it is highly likely that there are many more such references.

At least the dissenters in the St. Cyr. agree that the writ is suspended when Congress passes a law that does not allow a certain group of people to use it. I.N.S. v. St. Cyr, 121 S. Ct. at 2299. In this instant case, if the lower court decisions are up held, then Congress has enacted the AEDPA in such a manner as it does not allow the filing of a habeas petition by those members of a class because they did not comply with the l-year time limit in the AEDAP because they were ignorant of the details of the AEDPA time limit. At some point procedural restrictions become substantive suspension of the Great Writ. For example, suppose Congress makes a law allowing habeas petitions to be filed only from 9:00 a.m. to 9:05 a.m. on the first Monday of each year. The U.S. Constitution does not allow the Great Writ of be so procedurally regulated that it is substanvely suspended to prevent it from being effective to correct the fundamental unfairness of incarcerating this actually innocent Petitioner.

CONCLUSION

The above shows that the writ of certiorari should be issued to secure uniformity in the administration of justice in the United States by resolving the conflict between the decisions of the Fifth and Ninth Circuits of the U.S. Court of Appeals regarding equitable tolling. The Petitioner also urges this Honorable Court to grant certiorari to give guidance to the courts in the application of 28 U.S.C. §2244(d)(1)(B). The Petitioner also requests certiorari be granted to conclusively resolve the question of the scope of the Suspension of the Writ Clause. The last

reason, but certainly not the least, the Petitioner requests certiorari be granted is to insure justice to the actually innocent Petitioner in this instant case.

Respectfully submitted by

Jeffrey Balawajder

November 13, 2001

Appendix A-1

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
No. 99-10807
Filed April 5, 2001

JEFFREY BALAWAJDER,
Petitioner-Appellant,

Versus

GARY L. JOHNSON,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
INSTITUTIONAL DIVISION,
Respondent-Appellee.

Appeal from the
United States District Court
For the
Northern District of Texas
(4:98-CV-1128-Y)

Before REYNALDO G. GARZA, HIGGINBOTHAM, and SMITH, Circuit Judges.

PER CURIAM:

Petitioner's habeas corpus petition was dismissed by the district court as untimely, having been filed more than

one year after his conviction and after the passage of the Anti-Terrorism and Effective Death Penalty Act. This Court granted a Certificate of Appealability on two questions. First, should the AEDPA statue of limitations have been equitably tolled because Balawajder's prison library did not receive a copy of the AEDPA until after the one-year period; and second, did this Court have jurisdiction to consider that question where Balawajder arguably did not present it in his application to the district court for a COA. After that COA was granted, we decided Felder v. Johnson, [n,1] which held that inadequacy of a prison law library did not warrant equitable tolling. Balawajder therefore moved to expand the COA to include the question of whether the absence of the AEDPA from his library constituted a state-created impediment, preventing the statute of limitations from running under 28 U.S.C. §2244(d)(1)(B). We granted his motion to expand the COA to include that question.

We hold that this Court does have jurisdiction to reach the question of equitable tolling, because Balawajder's pleadings below adequately indicated to the district court that he sought equitable tolling. We further hold, however, that Felder controls this case, and Balawajder is not entitled to equitable tolling.

We finally hold that, on these facts, the absence of the AEDPA from the prison library was not a state-created impediment that prevented Balawajder from filing. We note that the record reflects Balawajder's actual awareness of the

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n.1 204 F.3d 168 (5th Cir. 2000).

existence of the AEDPA well before the one-year period expires. In fact, Balawajder affirmatively requested a copy of the AEDPA, on the grounds that he knew it contained an important state of limitations. Further, the Warden advised Balawajder to request the AEDPA from the state library in Austin, and there is no evidence to suggest that Balawajder did so. Therefore, we have no occasion to decide whether §2244(d)(1) (B) might be invoked by the absence of the AEDPA from a prison library where the prisoner remains actually ignorant of the very existence of the statute. Here, Balawajder knew the AEDPA existed and that it imposed a statute of limitations. He was therefore not prevented from filing by its absence.

AFFIRMED.

Appendix B-1

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
No. 99-10807
Filed August 16, 2001

JEFFREY BALAWAJDER,
Petitioner-Appellant

Versus

GARY L. JOHNSON,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
INSTITUTIONAL DIVISION,
Respondent-Appellee.

Appeal from the
United States District Court
For the
Northern District of Texas, Fort Worth

ON PETITION FOR
REHEARING AND REHEARING EN BANC

Before REYNALDO G. GARZA, HIGGINBOTHAM,and SMITH, Circuit Judges.

PER CURIAM:

The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on

Rehearing En Banc, (Fed.R.App.P. and the Cir.R. 35) the Petition for Rehearing En Banc is also DENIED.

ENTERED FOR THE COURT:
Reynaldo G. Garza
United States Circuit Judge

VERBATIM AUTHORITIES

The Privilege of the Writ of Habeas Corpus shall not be suspended, unless in Cases of Rebellion or Invasion the public safety may require it.
U.S. Constitution, Article I, Section 9.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or of the right of the people to peaceably assemble, and to petition the Government for a redress of grievances.
U.S. Constitution, Amendment I.

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law, which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
U.S. Constitution, Amendment XIV.

Appendix C-2

VERBATIM AUTHORITIES

(1) A 1-year period of limitations shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of--

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) [Not applicable]; or

(D) [Not applicable].

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C. §2244(d) [effective 4-26-96].

Appendix D-1

EXCERPTS OF THE RECORD PROVING ACTUAL INNOCENCE

The following is quoted verbatim from the Record, pages 128 through 141-

Introduction

Many convicted prisoners proclaim their innocence, but few can, as I can, support their claims with scientific evidence. I am wrongly convicted of a May 1983 rape that occurred in Tarrant County (Fort Worth), Texas. A comparison test of the enzymes in blood and semen (commonly called a PGM or Multi-enzyme test) [n.4] performed by the Fort Worth Police laboratory personnel shows that my enzymes do not match the rapist's enzymes in the semen obtained from vaginal swabs from the victim shortly after her rape. At the FIRST TRIAL [a mistrial], the police laboratory technician lied and hid the fact that an enzyme comparison test was done in my case. It was not until the middle of the SECOND TRIAL that my scientific expert witness discovered the police laboratory enzyme comparison test and the fact that it excluded me as a possible suspect. The prosecution had a biologist counter that exculpatory enzyme test result by arguing that the results of the non-match were unreliable because the semen, taken from the vaginal swab and compared with blood drawn from me, was 4.75 years old. Obviously, the jury believed the prosecution's explanation that the test was too old to be reliable.

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n.4 People of California v. Morris, 245 Cal.Rptr.52,58 (Cal 2d App Dist 1998) aff'd 279 Cal Rptr 720 (Cal Supreme Ct 1990)

However, during my years in prison I have discover that the prosecution's star witness in my case, Doctor Edward Blake (yes he was also witness in the O.J. Simpson trial), prior to his testifying in my case, testified in a California death penalty trial, involving an enzyme comparison test of blood and 5 year old semen, that ANY RESULTS OF ENZYME COMPARISONS OF BLOOD AND SEMEN, NO MATTER HOW OLD, WERE ABSOLUTELY RELIABLE! [n.4] The reason why the enzyme test is reliable no matter the age of the blood or semen is that if the blood or semen is too biologically degraded to give reliable results, then nothing appears for comparison, but if the test shows any results then those results are reliable. In other words, the enzyme test causes a row of dots or lines to appear for each sample (person) tested, and then the rows of the dots or lines are matched or unmatched to the rape semen sample (rapist), but if no row or dots or line appears from a sample, then that sample of blood or semen is too old to test. In my case the rape sample and my sample both produced visible rows or dots that do not match!!! In the

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n.4 People of California v. Morris,

245 Cal.Rptr. 52, 58 (Cal 2d App Dist 1988) aff'd 279 Cal Rptr 720 (Cal Supreme Ct 1990). The test compares several protein enzymes including phosphoglucomutase (PGM) and the sub-types of PGM, in the blood and semen. The test is scientifically called an electrophoretic multi-enzyme test. "An electric current passes through the solution and the sample separates and migrates onto the [gel] medium into patterns that can be fixed, dyed, and interpreted by an analyst." Id. at 55-56; See P. Gianelli & E. Imwinkelreid, Scientific Evidence, 600-01 (Michie Co. 1986).

words of Doctor Blake, "the outcome of the experiment tells... in and of itself whether or not the procedure has been applied in a competent manner." People of California v. Morris, 245 Cal. Rptr. 52, 57 (Cal 2d App Dist 1988) aff'd 279 Cal.Rptr. 720 (Cal Supreme Ct 1990).

Three kinds of tests were performed to compare my blood and the rapist's semen obtained from the victim's vaginal swabs after rape. At the FIRST TRIAL and SECOND TRIAL expert witnesses testified that those three kinds of blood tests are exclusionary tests, not inclusionary tests. In other words, the experts explained, if one of several exclusionary tests show a defendant is excluded, then the defendant is excluded even if the other tests do not exclude the defendant. If five exclusionary tests do not exclude the defendant, but one exclusionary test excludes the defendant, then the defendant is excluded. One of the three exclusionary tests in my case is the above-described multi-enzyme test. The second of the three exclusionary tests performed in my case is the well-known AB0 blood group test, that is a kind of genetic marker test. The ABO blood group test did not exclude me. The third exclusionary test performed in my case was a DQ-Alpha genetic marker test. The DQ-Alpha test is NOT the better-known RFLP genetic test referred to as the "DNA fingerprint". The DQ-Alpha test is similar to the ABO blood group test in grouping samples according to genetic markers, but is smaller groups. The DQ-Alpha test also did not exclude me.

The published hyperbole about the so- called DNA fingerprint test confused the jurors so that they did not understand [the] significance of the DQ-Alpha test being only an exclusionary test.

Furthermore, the DQ-Alpha test in my case shows I have genetic marker 1.2 and 1.3. However, the Tarrant County District Attorney's Office admitted in an unrelated case "that one California court has noted that PCR tests may be unreliable for the locus known as 1.2." Trimboli v. State, 19-89-0081-CR, State's Supplemental Reply to Amicus Brief: PCR Test, p.2 (Tex App - Waco 1991). I have not yet been able to obtain the exact citation and more information about the referenced California case. Nonetheless, the reason the tests of DQ-Alpha genetic marker 1.2 are unreliable may explain why the DQ-Alpha test did not exclude me.

Again I shout, "The enzyme test excludes me! All other evidence is circumstantial!!!"

Another important point from the above-cited Trimboli case is that multienzyme test results in the Trimboli case were used to multiply the statistics presented to the jury for evaluation of the significance of the results of Trimboli's RFLP test, the so-called DNA fingerprint test. Trimboli v. State, 817 SW2d 785, 789 (Tex App -- Waco 1991) aff'd 826 SW2d 953 (Tex Cr App 1992). If the multi-enzyme test results are reliable enough to be used to give Trimboli three consecutive aggravated life sentences, then the multi-enzyme test is reliable enough to release me. The well-established principles of collateral estoppel and res judicata should prevent the State from making the court

a sport for duplicitous argument by the State. The State argues the reliability of the enzyme test when it supports the State's case, and, in another case, the State argues the unreliability of the enzyme test when it defeats the State's case. The State's attempt to make a sport of justice is the worst contempt of court.

Facts Relevant to Actual Innocence

1. On May 31, 1983 -- Leah Matzinger (LEAH) had sex with her husband, Dan Matzinger, early in the morning before he went to work. In the afternoon the RAPE and robbery of LEAH occurred after she let an armed (ASSAILANT) into her house in response to her classified newspaper advertisement. LEAH went to a neighbor's house and reported the RAPE. The Fort Worth Police were called and responded. The police took LEAH to John Peter Smith Hospital for a RAPE exam. At the hospital, as part of the RAPE exam, Doctor Ackerman made swabbings from the vagina of LEAH (VAGINAL SWABS) and those VAGINAL SWABS were stored in a refrigerator by Doctor Ackerman. Doctor Ackerman also testified that LEAH has herpes. (I have never had herpes but since 1972 I have chronic Hepatitis C.) Personnel of the Fort Worth Police Crime Lab conducted an ABO blood group and PGM enzyme screen comparison analysis of the semen taken from the VAGINAL SWABS and blood taken from LEAH, her husband, and me. The ABO blood group test did not exclude me as the ASSAILANT, but the PGM enzyme comparison excluded me as the ASSAILANT.

2. LEAH was the only witness to her RAPE and robbery. Although LEAH testified that: she was with the ASSAILANT for 15 to 20 minutes, just after pulling [a]

gun on her the ASSAILANT put his hand in front of her face; tied her up; she could not see him for much of the time before the ASSAILANT fled from her house; and that during the RAPE her face was covered by a sweater; and she could not see his face. Furthermore, the first police officers responding to the RAPE, Officers Robert Rettner and E.M. Burks, testified that LEAH was: hysterical just after the RAPE; sobbing, appeared upset, and intermittently crying; and in a mild state of shock. Furthermore, LEAH testified that she requires corrective lenses and was wearing glasses on May 31, 1983. However LEAH's neighbor for many years, Mr. Sassanella, testified in the IMPACT COURT on March 9, 1988, that he never saw LEAH wear eye glasses at any time he EVER saw her.

3. Very shortly after the RAPE, a police artist assisted LEAH in making a composite sketch (COMPOSITE SKETCH). The COMPOSITE SKETCH and LEAH's testimony both state that her ASSAILANT was 5'10" or 5'11", but I am only 5' 8". That COMPOSITE SKETCH and the police report states that the ASSAILANT had an English accent. I do not have an English accent and I never have had an English accent. See: LEAH's testimony for March 7, 9, & 10, 1988; Officer Barksdale's testimony on March 11, 1988; COMPOSITE SKETCH Exhibit, and photo Exhibits of me.

4. The only physical evidence of the RAPE, other than the VAGINAL SWABS, was LEAH's clothing, underwear, a bed sheet, and rope used to bind her. The testimony of police officers stated that in September 1987 they intentionally destroyed all the physical evidence except the VAGINAL SWABS while I was incarcerated awaiting

trial, and that on the pretense that they were not going to prosecute the case they obtained a court order to destroy all that physical evidence which they destroyed.

5. In June 1985 -- The Fort Worth Police called LEAH to tell her that they had a suspect and for her to come to their downtown offices. When LEAH arrived, the police told her that there may be more [than] one photo of me in the photo spread. The police then showed her 12 Polaroid-type photos containing 3 photos of me (!!!), 5 Hispanics (I am Caucasian), 2 men about 60 years old (I was 32 years old at that time), and 1 red haired person (I have blond-brown hair), and 1 photo of a person with facial characteristics similar to mine. From the 12 photos LEAH pulled a group of 3 photos closer to her, and the police told her that, "You got him. They are all the same person." Only 2 of the 3 photos were of me. LEAH testified in court that she thought all the 3 photos of the separated group were of 3 different people, and that after the police told her they were all the same person, then she "felt better about her identification."

6. I did not rape or rob LEAH on May 31, 1983 or at any other time. Documents introduced into evidence in this case show that I lived in San Francisco, California in 1983. In April 1983 I was treated for a nose infection in a San Francisco hospital. I obtained a California Driver's License in San Francisco in April 1983. I cashed a check in San Francisco on May 11, 1983 [LEAH was raped 5-31-83]. I was issued a traffic ticket in California in September, 1983.

In October 1983 I traveled to India. In May 1984 I returned to the United States due to an attack of kidney stones and stayed with my parents in Washington, D.C. In late summer of 1984 I moved to Denton, Texas.

7. On June 22, 1985 I was arrested on unrelated charges of unauthorized use of a motor vehicle, which were eventually dismissed, and confined in the Oklahoma County Jail in Oklahoma City, Oklahoma (OKLAHOMA JAIL).

8. On July 26, 1985, based on the impermissibly suggestive photo line-up described herein above paragraph 5, a probable cause warrant (PROBABLE CAUSE WARRANT) was issued by a Texas court to arrest me for the RAPE of LEAH.

9. On August 1, 1985 two Ft. Worth Police Officer confronted me in the OKLAHOMA JAIL by asking if I committed several murders and the RAPE of LEAH but they did not tell me the exact dates of those crimes. I replied to them that perhaps my travel to India would exclude me from some of the crimes they inquired about and I stated that I did not commit the RAPE of LEAH. However, those two officers said they might place a detainer against me for the RAPE of LEAH, but they did not mention that they had a PROBABLE CAUSE WARRANT, and they did not place any detainer against me even though those officers had possession of the PROBABLE CAUSE WARRANT.

10. On August 21, 1985 the PROBABLE CAUSE WARRANT was cancelled.

11. On October 11, 1985, after the Oklahoma charges were dismissed, I was extradited to Dallas County, Texas on a charge of theft by check (herein CHECK CHARGE).

12. On October 22, 1985 I posted bail bond for the CHECK CHARGE. I thereafter made all court appearances in November and December 1985. When released on bail bond for the CHECK CHARGE, I believed that the Ft. Worth Police realized the error in considering me a suspect for the murders and RAPE.

13. Unknown to me at the time, on November 14, 1985 INDICTMENT No. 262452D was filed accusing me of the RAPE of LEAH.

14. On March 22, 1986 I was arrested and confined in the Santa Clara County Jail in San Jose, California (CALIFORNIA JAIL) continuously until January 31, 1987 on another check charge.

15. On April 25, 1986 the Ft. Worth Police teletyped a notification to the CALIFORNIA JAIL to place a detainer against me (FT. WORTH DETAINER) based on the INDICTMENT, but made no request for extradition.

16. On April 28, 1986 the Dallas Police teletyped a notification to the CALIFORNIA JAIL to place a detainer again me (DALLAS DETAINER) based on allegations of violation of probation for the CHECK CHARGES, but they made a request for extradition.

17. On May 5, 1986 I was notified of the FT. WORTH DETAINER.

18. On June 1, 1986, the FT. WORTH DETAINER was released against me but I was not notified that the detainer had been dropped.

19. On January 31, 1987 I was extradited from the CALIFORNIA JAIL to Dallas, Texas for violating the probation on the CHECK CHARGES.

20. In February 1987 the probation for the CHECK CHARGES was revoked and I received a 2 year prison sentence.

21. On March 5, 1987 I went to the Texas prison Diagnostic Unit and released to go to Houston on parole a few days later on March 10, 1987.

22. On June 10, 1987 the Fort Worth Police finally cause me to be arrested to answer the INDICTMENT. Thereafter, I was transferred to the Tarrant County Jail in Fort Worth, Texas and have been continuously incarcerated since June 10, 1987 because of the RAPE case.

23. In September, 1987 the Fort Worth Police obtained an order from a municipal magistrate allowing them to destroy all the physical evidence in [the] RAPE Case because the police alleged that they were not going to prosecute the RAPE case!

24. On March 7, 1988 I gave a blood sample to Fort Worth Police Serologist Susan Taylor for her to use to compare my blood with semen taken from the VAGINAL SWABS.

25. On March 8, 1988 the FIRST TRIAL began.

26. On March 11, 1998, at the FIRST TRIAL -- Susan Taylor testified that she performed an ABO blood group test to compare the blood group of the semen taken from the VAGINAL SWABS with LEAH, Dan Matzinger (LEAH's husband), and myself. Susan Taylor committed perjury by testifying that she did not perform a test to compare the enzymes in the semen taken from the VAGINAL SWABS with the enzymes in the blood of LEAH, Dan Matzinger, and myself. See Susan Taylor's testimony March 11, 1988. Between March 7, 1988 and March 11, 1988 Susan Taylor did perform a test comparing the enzymes in the semen taken from the VAGINAL

SWABS with the enzymes in the blood of LEAH, Dan Matzinger, and myself (ENZYMES TEST). The ENZYMES TEST shows that my blood enzymes DO NOT match the enzymes in the semen of the ASSAILANT as taken from the VAGINAL SWABS. In other words, the ENZYMES *TEST* excludes me as the ASSAILANT in the RAPE. Susan Taylor and the Prosecutor deliberately hid the results of the ENZYMES TEST from the jurors in the FIRST TRIAL. Susan Taylor and the Prosecutor hid the results of the ENZYMES *TEST* from my attorneys and me until an expert witness one of my attorneys hired discovered the ENZYMES TEST results in the middle of the SECOND TRIAL in September 1989.

27. On March 11, 1988 a mistrial was declared in the FIRST TRIAL because the jury was deadlocked, could not reach a unanimous decision. The majority of the deadlocked jurors were for acquittal, and at one time voted 9 to 3 in favor of acquittal.

28. On April 27, 1988 I agreed to give a sample of my blood to have an DNA RFLP (Restriction Fragment Length Pattern) comparison test made of my blood and the semen (remember LEAH had sex with her husband on the day of the RAPE before the RAPE) taken from the VAGINAL SWABS, However, instead of performing the DNA RFLP comparison test, a test using polymorphism chain reaction technology (PCR) was made to compare my gene allele types with the gene allele types found in the semen of the VAGINAL SWABS. Comparison of gene allele types is commonly called ALLO-typing, but has been erroneously called a PCR test through the briefs and petitions involved in this case. The ALLO-typing test done in this case tested for variations of the DQ-Alpha allele

(DQ-ALPHA TEST). The DQ-ALPHA TEST is similar to the ABO blood group test, which divides the population into 4 groups (4%, 11%, 40% & 45% in size), but the DQ-ALPHA Test divides the population into 20 smaller groups 15% in size. The DQ-ALPHA TEST was performed by Dr. Edward T. Blake of Forensic Science Associates of Richmond, California.

29. It was unknown to me until 1989 that in 1987 Dr. Blake testified in the California trial in The People of the State of California v. Tim Dale Morris in the Superior Court of Ventura County, California, Criminal Case No. B020005 (MORRIS). See People v. Morris, 245 Cal. Rptr. 52 (Cal.App.2 Dist. 1988). In MORRIS, Tim Morris faced the death penalty for murder of an elderly, deaf, one-legged man that happened on March 14, 1985 in the course of a burglary. In MORRIS, the intruder left a bloodstain on the concrete porch beneath a living room window he broke to enter the house, and a test matched the enzymes in a sample of that bloodstain with the enzymes in the blood of Tim Morris. In MORRIS, reliability of the enzymes comparison test was a crucial issue because previously the California Supreme Court, in People v. Brown, 726 P.2d 516, 522-23, 527 (Cal 1985), held that although enzyme test results had the same reliability as the ABO blood group test, they were inadmissible in that case where the prosecution had failed to introduce impartial testimony that the enzymes test was reliable. Therefore, in MORRIS, the prosecution introduced substantial evidence of the reliability of the enzymes comparison test.

In MORRIS, Dr. Blake testified that the enzymes comparison test was absolutely reliable because the test does not give a 'yes-or-no' answer, rather it either does not give any answer or it provides a reliable answer. In other words, either an answer appears or it does not. If no answer appears, then the sample was too degraded to test; and if an answer appears, then the answer is reliable. In the words of Dr. Blake, "the outcome of the experiment tells... in and of itself whether or not the procedure has been applied in a competent manner," People v. Morris, 245 Cal. Rptr. 52, 57 (Cal 2d App Dist 1988) aff'd 279 Cal. Rptr. 720 (Cal Supreme Ct. 1990). See also Kansas v. Washington, 622 P2d 986 (Kan. Supreme Ct. 1981) (noting multi-enzyme test used by more than 100 criminal laboratories and the F.B.I.); Missouri v. Onken, 701 SW2d 518, 521 (Mo. App. 1985)(enzyme test is conclusive as to match or mismatch). The MORRIS case also states that People v. Reilly, 242 Cal. Rptr. 496 (1987) "summarized testimony indicating that long term preservation of a stain could be accomplished by drying and freezing the sample for as long as five years." Morris, 245 Cal. Rptr. at 58. It should be noted that the ENZYMES TEST in this instant case was performed a little less than 5 years after the RAPE and that the sample was frozen for most of that time. Furthermore, it is highly probably that at the time of the SECOND TRIAL Dr. Blake was fully aware of not only his own testimony in the MORRIS case, but also the other testimony in the MORRIS CASE, and the full opinion set forth in People v. Morris, 245 Cal. Rptr. 52 (Cal. App. 2 Dist. 1988).

30. From August 1, 1989 through August 10, 1989 the SECOND TRIAL was held., Another prosecution expert witness, Dr. Hartman, a microbiology assistant professor at Texas Christian University, testified about basic genetics and PCR technology at the SECOND TRIAL. At the SECOND TRIAL, Dr. Blake extensively testified about the DQ-ALPHA TEST. Dr. Blake was a prosecution "star witness" at the SECOND TRIAL and testified longer than anyone else. At the SECOND TRIAL Dr. Blake extensively testified about PCR, RFLP, and the DQALPHA TEST.

31. Dr. Moses Schanfield testified in my defense at the SECOND TRIAL. In late 1988 the IMPACT COURT granted a motion, filed by my attorney, for money to hire an expert witness to testify in my defense regarding the semen and blood comparison tests. In early 1989 Dr. Moses Schanfield was hired as that expert witness for my defense. Dr. Schanfield's specialty is forensic serology and he was formerly in charge of all blood for the American Red Cross and for the U.S. Department of Public Health's Center for Disease Control in Atlanta.

32. Dr. Schanfield did not see the results of the ENZYMES TEST until late in the SECOND TRIAL on August 9, 1989 when the prosecution had almost finished presenting their case. At that time, Dr. Schanfield said to one of my attorneys, Mr. Pete Gilfeather,: The police lab report shows that your client could not have done this crime." Mr. Gilfeather replied, “What do you mean?” Dr. Schanfield said, "One of the tests the Fort Worth Police lab did back in 1988 was to compare your client’s blood enzymes with the rapist's enzymes and they do not match. In other words, the police lab's own test excludes him as

a possible suspect in this case." In my defense, Dr. Schanfield testified that the ENZYMES TEST excluded me as the ASSAILANT. After Dr. Schanfield testified in my defense, [unknown to us at the time] the prosecution could not have Dr. Blake testify because according to his previous testimony in the MORRIS case, the ENZYMES TEST is absolutely reliable. Therefore, just after Dr. Schanfield testified in my defense, Dr. Blake had to leave the SECOND TRIAL to return to California on unspecified "important business". In rebuttal to Dr. Schanfield's testimony the prosecution had Dr. Hartman, the little qualified microbiologist assistant professor testify that the ENZYME TEST was unreliable because it was conducted using a sample that was almost 5 years old. On Further cross examination of Dr. Schanfield, the prosecution asked if to his knowledge my ENZYMES TEST was the oldest test showing readable results, and Dr. Schanfield answered, "Yes." Of course there has to be the results of a [reliable] test somewhere that is labeled the oldest. The prosecutor then asked Dr. Schanfield if he would wager his academic reputation that the ENZYMES TESTS in my case were reliable. Dr. Schanfield answered, "NO." In other words, Dr. Schanfield double-crossed me, by first telling my attorneys and I that the ENZYMES TEST excluded me as the ASSAILANT, and testifying before the jury that he did not really believe the ENZYMES TEST excluded me as the ASSAILANT. In the prosecutor's closing argument he strongly argued that even Dr. Schanfield was not convinced the ENZYMES TEST excluded me as the ASSAILANT. The guilty verdict, obviously, shows the jury was influenced by the prosecutor's argument. Remember that at the time of Dr. Hartman's rebuttal testimony, my attorneys

and I did not know about the absolutely reliable nature of the enzymes comparison test and Dr. Blake's testimony in MORRIS. Before having Dr. Schanfield testify, my attorneys should have requested a continuance based upon the newly discovered evidence of the ENZYMES *TEST* and researched and considered the best way to present the ENZYMES TEST in my defense. If my attorneys had done that, then there is likelihood that they would have discovered Dr. Blake's testimony in the MORRIS case and compelled his testimony about the ENZYMES TEST in my defense.

Arguments Regarding Actual Innocence

In addition to the above-cited cases of sister states and the cases cited therein those cases, the reliability of the results of the multi-enzyme comparison test has been accepted in two cases of the Texas Court of Criminal Appeals in affirming two Texas appellate courts affirming 2 Fort Worth murder cases. In Kelly v. State, 792 SW2d 579, 582 (Tex App [Ft. Worth] 1990) aff'd 824 SW2d 568 (Tex Cr App 1992), the Second District Court of Appeals approved the use of a multi-enzyme comparison test to obtain a murder conviction and aggravated life sentence against Barry Kelly. In Trimboli v. State, 817 SW2d 785, 789 (Tex App [Waco] 1991) aff'd 826 SW2d 953 (Tex Cr App 1992) the Tenth District Court of Appeals approved the use of a multi-enzyme test to multiply the probability statistics of a DNA test used to obtain 3 consecutive aggravated life sentences against Ronald Trimboli. Since the Court of Criminal Appeals accepts the results of multi-enzymes tests to imprison men for life, then it must also accept the results of the same tests to release me, a man

sentenced to prison for 70 years (practically life).

The only evidence of my guilt in this case is the most unreliable form of evidence, eyewitness testimony, the testimony of LEAH. In this instant case LEAH's identification of me as the ASSAILANT was tainted by an impermissibly suggestive photo line-up conducted years after her RAPE. The description LEAH gave to the police first responding to the scene does not come close to my physical description at the time of the RAPE. The COMPOSITE SKETCH and the description given on the COMPSITE SKETCH does not come close to my physical description. Furthermore, LEAH only had a few short minutes to view her ASSAILANT and it is highly doubtful that during the few minutes that she did see her ASSAILANT that she was wearing the corrective lenses prescribed for her.

The photo identification implanted in LEAH's mind by an unusually suggestive photo line-up is further called unto question by the unusual action of the police in deliberately destroying all the other evidence that might possibly be exculpatory. Then we have the unusual perjury of Ft. Worth Police Lab Technician Susan Taylor testifying at the FIRST TRIAL that she did not perform an enzyme comparison test or that the ENZYMES TEST did not give any results. There is something else unusual in this case --

The appeal attorney I chose was replaced by a former assistant district attorney of Tarrant County who was in that position while my case was pending and who was married to the chief of the criminal division of the office of the district attorney in Tarrant County while my case was pending. That appeal attorney replaced one who employed, as his private investigator, the Fort Worth police detective

who had been assigned to my case while it was pending. Unusual is too light a word to describe all those unusual things together. Criminal conspiracy to frame an innocent man is a more accurate description of the suggestive line-up, destruction of evidence, delays in trial, perjury about the ENNZYMES TEST, Trojan horse appeal attorneys, and failure of the prosecutor to reveal that prior testimony of his own expert witness, Dr. Blake, confirms the reliability of the ENZYMES TEST.

The foregoing conclusively shows that I am innocent of the RAPE of LEAH.